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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 167

A. H. THORNBURGH, ADMINISTRATOR OF THE ESTATE OF WINSTON ARTHUR CAMERON, DECEASED, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LAWRENCE E. GOLDMAN,
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Attorneys and Counselors for Petitioner.

INDEX.

Subject Index.

Petition for Writ of Certiorari..... 1-10

Statement of Matter Involved..... 1

Statement of the Case..... 2-4

Summary of the Evidence..... 4-8

Reasons Relied Upon for Granting Writ of Certiorari. 8-10

Brief in Support of Petition for Writ of Certiorari.. 11

I. The Opinion of the Court Below..... 11

II. Jurisdiction. 11

III. Statement of the Case..... 12

IV. Specification of Errors..... 13

V. Argument. 15

Conclusion. 31

Table of Cases.

Baltimore & Ohio Ry. Co. vs. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419..... 23

Barksdale vs. United States (CC10), 46 F. (2) 762.. 16

Bartee vs. United States (CC6), 60 F. (2) 247.....16, 17

Carter vs. United States (CC4), 49 F. (2) 221..... 17

Chesapeake & Ohio Ry. Co. vs. Martin, 283 U. S. 209, 75 L. Ed. 983, 51 S. Ct. 453..... 23

Coyner vs. United States (CC7), 103 F. (2) 629.... 29

Davidson Steamship Co. vs. U. S., 205 U. S. 187, 27 S. Ct. 480, 51 L. Ed. 764..... 23

Eastman Kodak Co. vs. Photo Materials Co., 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684..... 23

Gasoline Products Co. vs. Champlin Refining Co., 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188..... 23

Gower vs. United States (CC10), 50 F. (2) 370.... 17

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720, 50 S. Ct. 231.....12, 23, 29

Herencia vs. Guzman, 210 U. S. 44, 31 S. Ct. 135, 55 L. Ed. 81..... 30

Louisville, etc., R. Co. vs. Woodson, 134 U. S. 614, 621, 10 S. Ct. 628, 33 L. Ed. 1032.....29, 30
Lumbra vs. U. S., 290 U. S. 551, 78 L. Ed. 347, 54 S. Ct. 272.....12, 16, 29

Marsh vs. United States (DC), 33 F. (2) 554..... 17
McCleary vs. United States (CC9), 64 F. (2) 1016.. 17
McPhee vs. U. S. (CC9), 31 F. (2) 243..... 16
Meyers vs. Pittsburg Coal Co., 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906.....12, 30

Pennsylvania R. Co. vs. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819..... 12

Reid vs. Maryland Casualty Co., 63 F. (2) 10..... 23

Sligh vs. United States (CC9), 31 F. (2) 735..... 16
Storey Parchment Company vs. Patterson Parchment Company, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544..... 23

United States vs. Aspinwell (CC9), 96 F. (2) 867... 29
United States vs. Brown (CC10), 72 F. (2) 608.... 16
U. S. vs. Cornell (CC8), 63 F. (2) 180..... 16
United States vs. Cox (CC5), 24 F. (2) 944..... 17
United States vs. Duncan (CC7), 67 F. (2) 356..... 16
United States vs. Hartley, 95 F. (2) 923..... 16
United States vs. Ingalls (CC10), 67 F. (2) 593..... 16
United States vs. Jones (CC10), 65 F. (2) 652.... 16
United States vs. Martin (CC5), 54 F. (2) 554.... 16
United States vs. Phillips (CC8), 44 F. (2) 689.... 16
United States vs. Thomas (CC10), 64 F. (2) 245.... 16
United States vs. Thomson (CC10), 71 F. (2) 860.. 16
United States vs. Watson (CC4), 107 F. (2) 370.... 29

Walker vs. New Mexico R. Co., 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837..... 12

Statute.

Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USC, Sec. 347.. 12

SUPREME COURT OF THE UNITED STATES

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A. H. THORNBURGH, ADMINISTRATOR OF THE ESTATE OF WINSTON ARTHUR CAMERON, DECEASED, PETITIONER.

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of Matter Involved.

Your petitioner, A. H. Thornburgh, administrator of the estate of Winston Arthur Cameron, deceased, respectfully represents that the Circuit Court of Appeals for the Eighth Circuit has reversed a judgment entered by the District Court of the United States for the Western District of Missouri, Southern Division, in favor of the petitioner in an action to recover disability benefits under a contract of war risk insurance issued to the deceased while he was in the naval service of the United States. (The opinion is reported in 111 F. (2) 278.)

Confident that he can demonstrate to this Honorable Court that the record plainly and unequivocally discloses a denial of his constitutional rights to a trial by jury, a unique and unusual procedure (unwarranted by law) in the review of the trial court proceedings and that the Circuit Court of Appeals exceeded its jurisdiction and authority in reversing the judgment of the District Court, the petitioner submits that a writ of certiorari should be granted in this cause for these and for the reasons hereinafter specified.

Statement of the Case.

Winston Arthur Cameron originally brought this suit in November, 1930, against the United States of America to establish its liability under a contract of war risk insurance and to enforce the payment of certain disability benefits provided therein. Mr. Cameron died on January 21, 1939, and the action was then continued and prosecuted in the name of the petitioner, as administrator of the veteran's estate.

The petition in this cause, as amended, alleged that while Cameron was in the naval service of the United States, he was granted an insurance contract which provided for its maturity in the event of death or permanent and total disability, in the amount of $10,000; that the insurance continued in force until June 24, 1920; that on May 11, 1920, or at a date prior to June 24, 1920, Cameron did become permanently and totally disabled by reason of pulmonary tuberculosis, heart trouble and asthma. The respondent denied liability.

On November 20, 1935, a general verdict was found in Cameron's favor and a judgment was accordingly

entered for him. The respondent then appealed to the Eighth Circuit Court of Appeals, which reversed and remanded the cause upon the ground that the plaintiff had not established that his total disability prior to June 24, 1920, was reasonably certain to continue throughout his life.

Thereafter, the cause was again tried in the District Court and a general verdict was found for the petitioner on April 8, 1939. The defendant appealed from this judgment to the Circuit Court of Appeals for the Eighth Circuit, complaining:

> (1) That the trial court erred in denying respondent's motion for a directed verdict in its favor at the close of all the evidence;
>
> (2) That the trial court erred in refusing to further instruct the jury on the duty of the veteran to take treatment and medical advice and if the jury was unable "to determine from the evidence whether or not the veteran would have recovered had he taken the advice and treatment, then their verdict should be for the defendant."

At the hearing before the Circuit Court of Appeals the second ground was not urged in view of the trial court's direction in its charge to the jury practically covering this request.

On May 2, 1940, the Eighth Circuit Court of Appeals reversed the judgment of the lower court on the ground that the medical evidence as to the permanency of the veteran's disability was not credible and that it was therefore speculative and conjectural, although it admitted that the evidence established (as the defendant conceded) that Cameron suffered from active pulmonary tuberculosis from 1919 to the date of his death.

There is no support in the record for the Circuit Court's conclusion that the petitioner's evidence did not establish by substantial evidence that Cameron was both permanently and totally disabled before June 24, 1920. In arriving at its decision, the court clearly invaded the province of the jury and usurped its exclusive functions. It ignored the important and substantial evidence of several of the doctors, refused to accept the competent and substantial testimony of Dr. Thornburgh and Dr. Camp (on the ground that the court did not credit their evidence, although they were corroborated in many respects by the defendant's medical expert and certain Government medical reports), denied to the petitioner the proper application of the rules of review as declared by this Honorable Court and by other Circuit Courts of Appeal, applying unusual and unwarranted tests in determining the sufficiency of the evidence, and as will hereafter appear, violated the petitioner's constitutional rights in other respects.

Summary of the Evidence.

The parties stipulated to the following facts:

That insured entered the United States Navy on October 6, 1917, and was discharged on April 9, 1918; that on December 8, 1917, he applied for and was granted $10,000 war risk insurance, which remained in full force and effect until June 24, 1920; that this insurance was payable in the event of death or permanent and total disability; that there existed proper disagreement between the parties so as to authorize the jurisdiction of the court.

Cameron entered the navy at the age of sixteen and while in service was hospitalized for pneumonia, pleurisy

and other ailments. (R. 26, 263.) At the time of his return home from the service he was in a very weakened physical condition, had a persistent cough, coughed up blood, had night sweats, shortness of breath, swelling of the feet and a severe bilateral ear disease. These symptoms persisted until his death. (R. 50, 52, 54, 109.)

It was undisputed that Cameron suffered from active tuberculosis from 1919 to the time of his death. The Circuit Court observed in its opinion that the Government's testimony tended to show that Cameron suffered from pulmonary tuberculosis, which remained active and progressive from 1919 until his death.

Following his return from service Cameron first received medical treatment from Dr. Henry and Dr. Fleming, and then in the spring of 1919 entered the care of Dr. A. H. Thornburgh and Dr. R. A. Sparks. (R. 29, 30, 31.)

On May 11, 1920, while the insurance was still in effect, Cameron was examined by Dr. D. C. Kalloch, a Government physician, who made a diagnosis of active pulmonary tuberculosis and chronic otitis media. (R. 109, pl. ex. 6.) His findings demonstrated that several lobes of the veteran's lungs were diseased.

In June, 1920, the veteran entered the Missouri State Sanitarium of Mt. Vernon, Missouri, where (as the appellate court stated) he did not receive proper treatment and suffered a severe hemorrhage. (R. 30, 32, 71.) He then returned home to the care of Dr. Sparks and Dr. Thornburgh. Several months later, upon their advice, he went to California where he remained for six years.

On April 16, 1925, the Veterans Bureau declared Cameron to be totally and permanently disabled. He was so rated until his death.

DR. R. A. SPARKS testified that Cameron consulted him in 1919 about his condition and a number of times thereafter until the fall of 1920. When he examined Cameron in 1919 he found him to be suffering from active pulmonary tuberculosis, complicated with an asthmatic condition and that his prognosis was unfavorable. (R. 148, 149, 150, 152, 153.)

DR. THORNBURGH, a prominent physician with an extensive experience in the treatment of chest conditions, first examined Cameron in June, 1919, and had him under his care until he went to California in 1920, and at various times thereafter. He testified that in 1919 he found Cameron to be suffering from chronic, active, moderately advanced pulmonary tuberculosis complicated with myocarditis (heart disease) and asthma, and that he also had chronic inflammation of both middle ears. He testified that he found several small cavities in the apices of the lungs; that the disease had spread over three lobes of the lungs and also involved the bronchial tubes (R. 157, 158, 159, 160, 161, 162); that Cameron had the severe type of lesion. (R. 164, 165.)

The doctor further testified that it was his opinion in 1919 that because of Cameron's age and the condition that he found him in, the patient would not recover; that he never held out any reasonable hope for recovery at any time (R. 168, 169); that it was his belief then and thereafter that the condition that Cameron was in would continue as long as he lived and that it would be dangerous for him to attempt any kind of work. (R. 171, 187.)

> "It was my judgment that he would not recover to the extent of being able to carry on any gainful occupation without danger to himself and to his life." (R. 187.)

The doctor's evidence was uncontroverted and his findings and opinion were supported, not only by plaintiff's other medical experts, but also by the Government's examination of May 11, 1920, to which reference will later be made, and Dr. Snider, the defense expert.

DR. FRANCIS CAMP, a specialist in internal medicine, testifying as an expert, basing his opinion upon Dr. Thornburgh's physical findings in 1919 and Cameron's constitutional symptoms then present, testified that in his opinion Cameron was in 1919 suffering from active advanced tuberculosis and that in his opinion the patient's condition was permanent. (R. 190, 192.)

A large number of Veterans Bureau medical examination reports were introduced by the plaintiff covering the period between 1920 and 1937. All of these substantiated the petitioner's contention that Cameron was suffering from chronic, progressive advanced pulmonary tuberculosis, which affected all lobes of the veteran's lungs. (R. 109, 144.)

Here we call attention to the testimony of the defendant's medical expert, Dr. Snider, who testified that where more than two lobes are involved, or where there are multiple cavities in the lungs, then the case is to be classified as "far advanced" (R. 245); that the myocarditis, which was present in 1919, was due to the poisoning of the heart by the tuberculosis and the damage to that organ was permanent. A hypothetical question upon the case was propounded to Dr. Snider and it was his opinion that the patient presented an advanced case of tuberculosis in 1919 and that the outlook for recovery was "pretty bad." (R. 254.)

Dr. Snider was asked the meaning and significance of the findings contained in the Government examination report of May 11, 1920. (R. 109.) In the light of his explanation of the terms and findings, that report discloses that more than two lobes, and at least three lobes, of Cameron's lungs were then involved. This is significant in that Dr. Thornburgh's testimony as to his findings were corroborated by the findings of that Government examiner.

In 1921 Cameron applied for vocational training, but was rejected because of his physical condition. (R. 47, 48, 113.) Thereafter, he made several intermittent and unsuccessful attempts to engage in employment but these efforts were defeated by his physical condition. He continued under medical supervision of the Veterans Bureau from May 11, 1920, to his death. He died at Whipple Barracks, Arizona, on January 21, 1939.

Reasons Relied Upon for Granting Writ of Certiorari.

It is respectfully submitted that a writ of certiorari be granted for the following reasons:

1. That the Circuit Court of Appeals exceeded its authority and jurisdiction by invading the province of the jury, in that it assumed to weigh the evidence, pass upon the credibility of the witnesses, reject competent, material and relevant evidence, drew unwarranted inferences without factual basis and re-examined into the facts tried by the jury in a manner contrary to the usual and lawful procedure, all in contravention of the petitioner's right to trial by jury, as guaranteed by the Seventh Amendment to the Federal Constitution;

2. That the Circuit Court of Appeals has decided an important question of general law in a way conflicting with the decisions of this Honorable Court and the Circuit Courts of Appeal by taking upon itself and assuming the functions of a jury, and further, by adopting an unusual and unwarranted method and procedure in considering whether there was substantial evidence to support the verdict, and further, in characterizing substantial, material and positive evidence as speculative and conjectural;

3. That the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision, in that, contrary and in a way conflicting with the decisions of this Honorable Court and the Circuit Courts of Appeal, in determining whether there was substantial evidence to support the verdict, the Eighth Circuit Court of Appeals did not, and failed to, view the evidence in the light most favorable to the plaintiff, did not form such favorable inferences as may be reasonably drawn therefrom, did not assume as established all facts that the evidence supporting the plaintiff's claim reasonably tends to prove, and all facts deducible therefrom, nor presume that the facts warranted the verdict rendered by the jury, but instead, the Circuit Court of Appeals, as the record plainly discloses, reviewed the evidence in the most unfavorable light, rejected substantial, competent and material evidence, drew conclusions and inferences not warranted by the facts in evidence, interpreted evidence in an unwarranted and untenable light, characterized as speculation certain substantial, material and positive evidence, and reversed the judgment upon a hypothesis (as to the deceased's condition during the life of the policy) which has no basis whatever in the evidence of the case;

4. That the Circuit Court of Appeals by reversing the judgment, in the manner aforesaid, wrongfully deprived the petitioner of valuable rights and property without due process of law as guaranteed by the Fifth Amendment to the Constitution;

5. That the petitioner, plaintiff below, is entitled, under the law and the evidence, to recover and the Circuit Court of Appeals wrongfully reversed the judgment of the lower court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court, for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case, numbered 11589 —Civil, and entitled "United States of America, Appellant vs. A. H. Thornburgh, Administrator of the Estate of Winston Arthur Cameron, deceased, Appellee;" that said judgment of the Eighth Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

A. H. THORNBURGH,
Administrator of the Estate of Winston Arthur Cameron, Deceased, Petitioner.

LAWRENCE E. GOLDMAN,
FRANK R. DALEY,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. .....

A. H. THORNBURGH, ADMINISTRATOR OF THE ESTATE OF WINSTON ARTHUR CAMERON, DECEASED, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Eighth Circuit Court of Appeals is reported as *United States of America, Appellant* v. *A. H. Thornburgh, Administrator of the Estate of Winston Arthur Cameron, Deceased, Appellee*, 111 F. (2) 278.

II.

JURISDICTION.

1. The date of the judgment herein sought to be reviewed is May 2, 1940.

2. Your petitioner submits that this Honorable Court should review the decision of the Circuit Court of Appeals for the Eighth Circuit for the reasons relied upon in the foregoing petition (pages 8-10, inclusive), which in the interest of brevity are not here repeated.

3. That jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USC, Sec. 347.

4. The following cases are believed to sustain the jurisdiction of this Honorable Court:

Gunning v. *Cooley,* 281 U. S. 90, 74 L. Ed. 720, 50 S. Ct. 231.

Lumbra v. *U. S.,* 290 U. S. 551, 78 L. Ed. 347, 54 S. Ct. 272.

Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819.

Walker v. *New Mexico R. Co.,* 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837.

Meyers v. *Pittsburg Coal Co.,* 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906.

III.

STATEMENT OF THE CASE.

A full statement of the case, so far as material to the consideration of the questions presented herein, has been set out in the foregoing petition (pages 2-4, inclusive) and, in the interests of brevity, the statement is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Eighth Circuit erred in reversing the action of the trial court in denying defendant's motion for a directed verdict at the conclusion of all the evidence, and in ruling and holding that a directed verdict should have been granted. Under the facts, and the inferences to be drawn from the evidence most favorable to your petitioner, there was substantial evidence to support the findings of the jury and the judgment entered thereupon, in that there was substantial evidence upon which the jury could base its finding that the insured was not only totally disabled, but that the total disability was permanent in the sense that it was reasonably certain to continue throughout his life, before June 24, 1920.

2. The Circuit Court of Appeals erred in disregarding the substantial, relevant, material and competent evidence of Dr. R. A. Sparks, a medical witness, who testified that his examinations of the insured in 1919 and 1920 disclosed that the insured was suffering from active pulmonary tuberculosis, and that his prognosis for recovery was unfavorable.

3. That the Circuit Court of Appeals erred in rejecting the substantial, competent, relevant and material testimony of Dr. A. H. Thornburgh, a witness for the plaintiff, who found upon examinations of the insured in 1919, and so testified, that the insured was suffering from advanced, active pulmonary tuberculosis, with cavitation, which was complicated by myocarditis and asthma, and who testified that as early as June, 1919, he was of the opinion that Cameron would

not recover; that Cameron was totally disabled at that time and that said total disability was permanent.

4. That the Eighth Circuit Court erred in holding that substantial, competent and relevant evidence was conjectural and speculative.

5. That the Eighth Circuit Court erred in refusing to accept the substantial evidence of Dr. Francis Camp, a medical expert, who testified that Cameron was suffering from chronic, active, advanced pulmonary tuberculosis in 1919 and that this condition was then permanent.

6. That the Circuit Court of Appeals erred in refusing to consider the supporting evidence of the Government medical report of May 11, 1920, the Government medical examination reports from 1920 to 1937, inclusive, and the favorable testimony of the defendant's medical expert, Dr. Sam Snider, all of which supported the petitioner's contention that the insured was both permanently and totally disabled before June 24, 1920.

7. That the Circuit Court of Appeals erred in failing and refusing to consider the evidence in the light most favorable to the plaintiff, to consider as established all the facts that the evidence supporting petitioner's claim reasonably tended to prove and to draw in his favor all the inferences fairly deducible from such facts.

8. That the Circuit Court of Appeals for the Eighth Circuit erred in reversing the action of the trial court and the findings of the jury in that the Circuit Court assumed to weigh the evidence and determine the credibility to be given to the witnesses, thereby contravening petitioner's constitutional right of a trial by jury as guaranteed by the Seventh Amendment to the Constitution.

9. That the said Eighth Circuit Court of Appeals erred in holding that the medical testimony of Dr. A. H. Thornburgh was incredible and unreliable, and that the testimony of Dr. Francis Camp, the medical expert, was speculative and without factual basis; that, therefore, there was no substantial evidence of permanency to support the verdict.

10. That the Eighth Circuit Court of Appeals drew unfavorable inferences not supported by the evidence, and contrary to the evidence, and failed and refused to draw the favorable inferences deducible from the facts in evidence.

V.

ARGUMENT.

The sole issue in this case before the trial court was whether Cameron became permanently and totally disabled while his insurance was in force, on or before June 24, 1920. The plaintiff was, therefore, required to prove by substantial evidence that (1) the insured was totally disabled and (2) that the total disability was permanent, on or before that date.

The evidence was overwhelming that Cameron was suffering from chronic, active, advanced pulmonary tuberculosis from 1919 to the time of his death. The Eighth Circuit Court observed in its opinion that the testimony advanced by the Government tended to show that the insured was suffering from pulmonary tuberculosis in 1919 and 1920 and that it "remained active and progressive until it eventually, nearly twenty years later, caused the insured's death."

"Total disability," under contracts of war risk insurance, is defined as such impairment of mind or body which renders it impossible for the disabled person to continuously follow any substantially gainful occupation, without danger to his health. *U. S.* v. *Cornell* (CC8), 63 F. (2) 180; *United States* v. *Ingalls* (CC10), 67 F. (2) 593; *McPhee* v. *U. S.* (CC9), 31 F. (2) 243. To be totally disabled one need not be unable to do anything whatever, or be helpless or bedridden. If he cannot earn a living by working without injury to his health, then he is considered as totally disabled. *United States* v. *Martin* (CC5), 54 F. (2) 554; *United States* v. *Thomson* (CC10), 71 F. (2) 860. The mere fact that one has done some work after the lapse of his policy does not preclude him from asserting that he was in fact permanently and totally disabled. *Lumbra* v. *United States*, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492; *United States* v. *Hartley*, 95 F. (2) 923; *Barksdale* v. *United States* (CC10), 46 F. (2) 762; *United States* v. *Phillips* (CC8), 44 F. (2) 689. An insured's efforts to carry on in face of physical affliction may tend to corroborate that he was in fact totally disabled. *United States* v. *Thomas* (CC10), 64 F. (2) 245.

The courts have uniformly held that one suffering from active tuberculosis is physically unfit to work because he cannot work without great danger of accelerating the progress of the disease and imperiling his life. *Sligh* v. *United States* (CC9), 31 F. (2) 735; *United States* v. *Duncan* (CC7), 67 F. (2) 356; *United States* v. *Jones* (CC10), 65 F. (2) 652; *United States* v. *Brown* (CC10), 72 F. (2) 608; *United States* v. *Thomas, supra; Bartee* v. *United States* (CC6), 60 F. (2) 247.

There was no question throughout the case as to the total disability of Cameron from 1919 to the time of his death. The Government challenged the sufficiency of the evidence solely on the ground that "there was no substantial evidence of the permanency of the disability on the crucial date." (Appellant's (C.C.A.) Brief, page 13.)

The Bureau of War Risk Insurance, in Bulletin No. 11, defined "permanency" in the following language:

> "'Total disability' shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it."

Also see *Marsh* v. *United States* (DC), 33 F. (2) 554; *United States* v. *Cox* (CC5), 24 F. (2) 944; *Carter* v. *United States* (CC4), 49 F. (2) 221; *Gower* v. *United States* (CC10), 50 F. (2) 370; *McCleary* v. *United States* (CC9), 64 F. (2) 1016; *Bartee* v. *United States, supra.*

Was there substantial evidence to support a finding that Cameron's condition, prior to June 24, 1920, was permanent?

Dr. R. A. Sparks testified that in the spring of 1919 he found Cameron to be suffering from active pulmonary tuberculosis complicated by asthma and his prognosis for recovery was unfavorable. He did not then believe that Cameron would ever get well. (R. 148, 149, 152, 153.)

Dr. A. H. Thornburgh testified that Cameron came under his professional care about June 1, 1919; that within a couple months thereafter he made several physical examinations of the insured. (R. 157, 158.) He found Cameron suffering from active tuberculosis and that the disease involved not only three lobes of the lungs, but also the bronchial tubes. Several small cavities were

present. (R. 161, 162.) The condition was complicated by myocarditis and asthma. At that time (1919) he made a diagnosis of active, chronic, moderately advanced pulmonary tuberculosis complicated by myocarditis and asthma. (R. 163.) He testified that because of Cameron's youth, the extent of the disease, and the complications that were present, he did not believe that Cameron would ever recover. We quote from Dr. Thornburgh's testimony:

Q. Did you, Doctor, expect that Winston Cameron in the condition that he was in, with any reasonable—did you hold out any reasonable hope—now I mean reasonable hope, not just a possibility—that he would recover at that time, in your mind?

A. No, sir, I did not. (R. 168, 169.)

"It was my opinion that his age and condition I found him in, it was doubtful he would ever recover from this infection." (R. 168.)

Q. You were of the opinion from the nature of the condition that it would continue as long as he lived?

A. Yes.

Q. And that was your opinion then?

A. Yes, and it would be dangerous for him to attempt any kind of work. (R. 171.)

Q. (by Government Counsel) Now when you say that this man's condition was permanent there, are you taking into consideration what occurred after that time?

A. No.

Q. The fact he died?

A. No.

Q. And the fact that he—

A. (interrupting) I was forming my opinion at that time from the condition I found in the lung. . . . (R. 173.)

Q. Then it was your opinion at that time that he would not recover?

A. Yes, sir. (R. 187.)

Q. Did you entertain any reasonable thought in your mind, or any reasonable hope, for Cameron ever arresting the condition as you found it?

A. It was my judgment that he would not recover to the extent of being able to carry on any gainful occupation without danger to himself and to his life. (R. 187.)

Cameron continued under the care of Drs. Sparks and Thornburgh, and on May 11, 1920, he was examined by a Dr. Kalloch, a Government examiner. The diagnosis was active pulmonary tuberculosis and otitis media bilateral (an ear disease). His findings, as shown by the report in evidence (Ex. 6, R. 109) demonstrated that the disease was present in at least three lobes of the lungs, according to the explanation of Dr. Snider, the Government medical witness (R. 252, 253), of the terms and phraseology of that report.

Dr. Francis Camp, a specialist in internal medicine, based his opinion upon Dr. Thornburgh's testimony of Cameron's constitutional symptoms and general physical and pathological findings in 1919. He testified:

". . . Basing the prognosis or such an opinion upon the fact that we have a man, or boy in his teens, seventeen, in 1918, with advanced tuberculosis, cavitation, with that picture, I think at that time I could advance the opinion that he would not recover from that disease." (R. 192.)

Q. Now, with the man in an advanced stage, with cavitation such as we have been describing here, it is a rarity rather than the expected that he ever gets well?

A. It is the rule that he dies of tuberculosis. (R. 195.)

The Circuit Court of Appeals, commenting on Dr. Camp's testimony said:

> "If Dr. Camp's opinion, based upon Dr. Thornburgh's recollection of conditions disclosed by his examinations of the insured in 1919 and 1920, is to be regarded as substantial evidence that the insured prior to June 24, 1920, had a virtually incurable advanced case of tuberculosis with cavitation, the judgment should be affirmed."

The large number of Government medical reports from 1920 to 1937 (R. 109-144) demonstrated the steady progress of the disease and the complete involvement of every part of both lungs by 1923. A Government medical examiner noted on the report of March 16, 1925, that Cameron was "permanently and totally disabled," and he was so formally declared by the Bureau on April 16, 1925. (R. 42.)

Dr. Sam Snider, the defendant's medical expert, expressed his opinion that one having the symptoms and extent of involvement that Cameron had in May, 1919,

was suffering from "far advanced" tuberculosis and that his outlook for recovery was "pretty bad." (R. 254.) He testified that where more than two lobes of the lung were involved, or where there were several cavities, the patient is to be considered as a "far advanced" case of tuberculosis. (R. 254.) His own diagnosis of Cameron's condition in June, 1928, was "far advanced tuberculosis." (R. 256.) He explained that myocarditis which was present in 1919 was directly due to the poisoning of the heart cells by the tubercule bacilli and complicated the tuberculosis by impairing the circulation and was a permanent injury to the organ. (R. 253.)

The opinion in this case discloses that no consideration was given to Dr. Spark's testimony, which the petitioner believes, together with the Government medical examination report of May 11, 1920, would be sufficient substantial evidence to permit the case to go to the jury, even without the convincing evidence of Drs. Thornburgh and Camp.

The testimony of Dr. Thornburgh, it is submitted, was clear, convincing and substantial. The fact that it is based upon his recollection of the facts, or that his conclusion as to the extent of the involvement was based upon physical examination and not upon X-ray examination, does not make his evidence the less substantial. These would simply be for the consideration of the jury, which had before it the witness and was able to observe his manner upon the witness stand and the candor with which he testified, in weighing the evidence and the credibility of the testimony. There is nothing incredible, speculative or conjectural about this evidence and the Circuit Court was not warranted in rejecting it.

There was a definite factual basis for Dr. Thornburgh's opinions:

(1) He was Cameron's attending physician during 1919 and 1920;

(2) He made several examinations within a period of several months in 1919 of Mr. Cameron's lungs and heart;

(3) He definitely ascertained the extent of the tubercular involvement by physical examination;

(4) He knew Cameron's age;

(5) He found the heart condition and the asthma which complicated the tuberculosis;

(6) And he had a definite history of the disease for more than a year prior to his first examination of the insured;

The Circuit Court of Appeals completely rejected the evidence of Dr. Thornburgh and Dr. Camp, saying (in its opinion), "we think that their testimony was not an adequate basis for concluding that the insured's case was incurable prior to June 24, 1920."

In so holding there was not only a complete disregard for the rules of evidence as applying to this testimony, but a complete disregard of *all* of the medical testimony in the case.

The credibility of witnesses and the weight and probative value of evidence is solely within the province of the jury, and the invasion of the Circuit Court, as the opinion plainly discloses, was a clear violation of the

constitutional rights of the petitioner as guaranteed by the Seventh Amendment.

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188.

Baltimore & Ohio Ry. Co. v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.

Eastman Kodak Co. v. *Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684.

Gunning v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

Chesapeake & Ohio Ry. Co. v. *Martin*, 283 U. S. 209, 75 L. Ed. 983, 51 S. Ct. 453.

Davidson Steamship Co. v. *U. S.*, 205 U. S. 187, 27 S. Ct. 480, 51 L. Ed. 764.

In *Storey Parchment Company* v. *Patterson Parchment Company*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544, the Circuit Court likewise went far afield and condemned substantial and material evidence as speculation and conjecture. This Honorable Court said "this characterization of the basis is unwarranted."

"District judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony. They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution. Its purpose and aim is not to preserve matters of form and procedure, but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly, or indirectly, to take from the jury or to itself such prerogatives." *Reid* v. *Maryland Casualty Co.*, 63 F. (2) 10.

The Circuit Court drew inferences which are not warranted by the testimony, and made statements with reference to the testimony which find no support in the record.

The opinion states that on cross examination Dr. Thornburgh testified that he *could* be mistaken to the extent of the tubercular involvement of the lungs. Let us examine the record:

> **Q. In other words, the physical examination isn't reliable, is it?**
>
> **A. Well, you can make mistakes in a physical examination as to the extent of involvement, that is, the character of the involvement, see.**
>
> **Q. In other words, you might be misled by the symptoms, might you not?**
>
> **A. You can be.**
>
> **Q. You might be misled by the severity of the symptoms in believing with your physical examination, there was a greater involvement than what there was?**
>
> **A. Yes.**
>
> * * * * *
>
> **Q. And it is very easy on just a physical examination alone to be mistaken about that, isn't it, Doctor?**
>
> **A. It is. You can make mistakes.**

In the first place, medicine is not an exact science. In the second place, the doctor gave his testimony according to his findings and conclusions as a result of the examinations he made of Cameron in 1919. The doctor, in admitting that one might be mistaken, was speaking as a reasonable person. It would have been quite unreasonable for him or any other person to assume that mistakes cannot be made. But no inference can be drawn

from his testimony that he was mistaken in his findings made upon his examinations of Cameron in 1919. The questions were hypothetical and did not pertain to Cameron. Furthermore, this testimony taken in conjunction with his other testimony does not throw any reflection of doubt as to his belief in the accuracy of his findings, diagnosis and prognosis.

In 1919 and 1920 the X-ray was not available as it is today (R. 198), and the physical examinations then were more thorough. In the words of Dr. Camp, the specialist, "while we have today more definite procedures, there is less of the personal element in the present day methods of diagnosis." The X-ray is employed to either corroborate or negative the physical findings. (R. 197.)

Q. Because you can't tell the extent of involvement without the X-ray, can you?

A. I think you can.

Q. You think you are accurate without it?

A. I think you can be reasonably accurate.

Q. You didn't make any better physical examinations in 1919 than today, did you or did they?

A. I think they did, honestly, I think they made more careful physical examinations because they had to use their senses of touch, sight and hearing, etc., with a greater degree of accuracy than we do today. (R. 198.)

The extent of the involvement as testified to by Dr. Thornburgh is well substantiated by the Government medical examination of May 11, 1920, to which we have already referred. The Government X-ray report of October 31, 1923, demonstrates that by this time the disease had affected most parts of both lungs. (R. 115, 116.) The terms used in this report, and their significance were explained by Dr. Snider. (R. 249.)

The Circuit Court states that Dr. Thornburgh testified "that he could not say that the insured would not have recovered if he had followed the advice which was given him." What was the testimony in this respect?

Q. You don't know whether or not he followed your advice, do you, Doctor?

A. No, no.

Q. And as to whether he followed your advice or not determined whether he could get well, didn't it?

A. Largely. (R. 173.)

* * * * *

Q. And you don't know whether Cameron rested in bed or not?

A. No, sir, I don't know.

Q. Now, Doctor, in determining the outcome of the case, a great deal of it depends upon whether or not they take the advice of the doctor, doesn't it?

A. Very largely.

Q. And in his case a great deal depended upon whether or not he took the rest which you advised, didn't it?

A. Yes, sir.

Q. Rest in bed. Now when you say that this man's condition was permanent there are you taking into consideration what occurred after that time?

A. No. . . . I was forming my opinion at that time from the conditions I found in the lung and the man himself, the character, the makeup of the man himself. (R. 173.)

The Circuit Court observes that the doctor testified "that a large percentage of moderately advanced cases of tuberculosis do become arrested." It is submitted that there is sufficient basis for the prognosis and conclusion that Cameron had virtually an incurable condition, con-

sidering the extent of the involvement, *the youth of the patient and the complications of myocarditis and asthma.*

The Circuit Court says that Dr. Thornburgh placed the "insured in a class of tuberculars who have a reasonable chance for recovery." The evidence does not support this inference. Let us examine the record:

> **Q. (cross examination) But you couldn't say that this man was a hopeless case? You did not have that outlook, did you, Doctor, that you couldn't do anything with him?**
>
> **A. Well, I would say that he didn't look like a good patient to me. Now, to answer you, could I say he was hopeless—we don't say anybody is hopeless until they are dead. (R. 179.)**

The Circuit Court in its opinion states that "what the insured had in 1919 and 1920 was pulmonary tuberculosis in an *early* stage." There isn't the slightest basis in the plaintiff's evidence that warrants this inference, nor is there any factual basis for this in the defendant's evidence. Cameron's tuberculosis, before June 24, 1920, had reached a chronic and advanced stage. He had been suffering from tuberculosis for more than two years before this date. His tubercular condition could not be, under the circumstances, considered as "early tuberculosis" by the fartherest stretch of the imagination, in 1920.

The Circuit Court's conclusion that Cameron did not follow the advice of Dr. Thornburgh with respect to care and treatment has no factual basis in the record. He was under the constant care and attention of the Veterans Bureau from May 11, 1920, to his death.

The Circuit Court questions the accuracy of Dr. Thornburgh's findings upon the fact that Cameron lived twenty years after his examinations were made. It is

submitted, first, that Dr. Thornburgh's findings as to the extent of the tubercular condition does not vary greatly from the Government medical examination of May 11, 1920; second, that we do know that the Government found even a more advanced condition with greater infiltration in 1923, sixteen years before his death. There is only one conclusion that can properly be drawn from the facts, and that is that Cameron lived as long as he did *because he did take proper care of himself* and followed medical advice. This is the only proper inference that a reviewing court can draw from the evidence when reviewing the record for the purpose of determining whether the trial court erred in denying the peremptory instruction asked by the defendant.

It is of particular interest to note that in none of the Government medical examination reports does there appear any recommendation for hospitalization, and much less, any refusal on his part to accept any treatment. The only exception is the report of May 11, 1920, where sanitarium treatment was recommended and accepted. He was not advised by any of the doctors to go to a hospital. (R. 62.) Here it may be significant to note that, as Dr. Snider testified, "In 1918 people weren't as well convinced rest is worthwhile as they are today." (R. 257.) While Cameron did make several intermittent attempts to engage at employment, these were of short duration and he was unable to carry on because of his physical condition. These sporadic efforts certainly did not preclude the insured from the right to collect benefits. The characterization of these efforts by the Circuit Court, in one breath, as "intermittent" and in another, as "normal," is difficult to understand, particularly in the face of the evidence. All of these efforts were made

after 1923 when he had involvement in all lobes, and the greater part were after he had been declared permanently and totally disabled by the Veterans Bureau. In 1921 he was rejected for government vocational training on account of his physical condition.

The question as to whether or not Cameron failed to take proper treatment and whether he failed to observe those rules necessary for his care was certainly for the jury's consideration, and the trial court so instructed. (R. 276.) These were facts to be considered by the jury together with all the facts bearing on the question of permanency of the disability prior to June 24, 1920. *United States* v. *Watson* (CC4), 107 F. (2) 370; *United States* v. *Aspinwell* (CC9), 96 F. (2) 867. As the court said in *Coyner* v. *United States* (CC7), 103 F. (2) 629:

> "It is true that trying to work might aggravate a disease, but this circumstance *per se* does not necessarily indicate the extent and permanency of the disease."

In determining whether there was substantial evidence of permanency to support the verdict, the Eighth Circuit Court clearly *failed* to view the evidence in the light most favorable to the plaintiff and form such favorable inferences as may reasonably be drawn therefrom, or to assume as established all facts that the evidence supporting the petitioner's claim reasonably tended to prove and all facts deducible therefrom, as it was required to do. *Louisville, etc., R. Co.* v. *Woodson*, 134 U. S. 614, 621, 10 S. Ct. 628, 33 L. Ed. 1032; *Lumbra* v. *U. S.*, 290 U. S. 552, 78 L. Ed. 495; *Gunning* v. *Cooley, supra.*

If there is any substantial evidence to support the verdict, an appellate court will not interfere. *Louisville, etc., Ry. Co.* v. *Woodson, supra.* That an appellate court may be inclined to a different conclusion from that expressed by the jury is no ground for disturbing the verdict. *Herencia* v. *Guzman,* 210 U. S. 44, 31 S. Ct. 135, 55 L. Ed. 81. A verdict for plaintiff should not be set aside for lack of evidence, unless under the testimony no recovery can be had on the facts shown in any view which can be properly taken. *Meyers* v. *Pittsburg Coal Co.,* 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906.

The Circuit Court's procedure in reviewing the evidence in this case is in direct conflict and contrary to the usual and accepted procedure, which is so well established by the decisions of this Honorable Court and all the Circuit Courts. In this case, the Circuit Court appears to have adopted a fallacious test for the examination of the evidence to support the verdict and untenable rules for determining whether any substantial evidence of permanency was submitted.

Regardless of what attitude any jurist or any court may have towards a certain class of litigation, it is still essential that the same rules of evidence and procedure on review be applied as in all other cases. The denial of such equal consideration is a denial of the equal protection clause of the Federal Constitution and an unfair discrimination against holders and beneficiaries of Government insurance policies. It is essential to the maintenance of our institutions and respect for our courts that the courts themselves scrupulously heed the law and the established procedure in the consideration of all causes that may come before it, just as any individual is expected to be law abiding.

This suit is not purely a private controversy of no importance to the public, but the public, whose interest it is the duty of the courts to uphold, is concerned that every litigation be fairly and impartially conducted.

If the reasoning and directions of the Circuit Court were followed, we would have had this anomaly when the motion for directed verdict was offered by Government counsel to the trial court: On the one hand, under the decisions of this Honorable Court, the trial court was required to submit questions of fact, weight of the evidence and the credibility of the witnesses to the jury, as the sole judges thereof, and on the other hand, the trial judge would be required under this decision to pass upon the credibility of Dr. Thornburgh's testimony and disregard it because he or the Circuit Court might believe that it was unreliable and inaccurate. This situation would be an untenable one. Should the trial court follow the judicial repudiation of the Seventh Amendment to the Constitution, or should he abide by the Constitution and the decisions of this Honorable Court which safeguard the right to jury trial? If the Circuit Court is right in this cause, then a trial by jury as guaranteed by the Constitution no longer exists.

CONCLUSION.

The general verdict in favor of the petitioner was supported by substantial evidence and is conclusive on the facts found in his favor. The Eighth Circuit Court has decided several important questions of general law and procedure in a way conflicting with the decisions of this Honorable Court and other Circuit Courts, as has been pointed out. It has invaded the province and usurped the functions of the jury. It has deprived the

petitioner of valuable rights and property without due process of law. It has so far departed from the established rules of procedure in its consideration and evaluation of the evidence in a way contrary to the decisions of this court to such an extent as to warrant the exercise of the supervisory authority of this Honorable Court.

It is, therefore, respectfully submitted that a writ of certiorari should be granted and that this court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and finally reverse it, and grant such further relief in the premises as may be proper.

LAWRENCE E. GOLDMAN,
FRANK R. DALEY,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	5
Conclusion	6

CITATIONS

Case:	
United States v. *Cameron*, 87 F. (2d) 61, certiorari denied, 301 U. S. 688	4
Statutes:	
War Risk Insurance Act, c. 105, 40 Stat. 398, Sec. 400	2
War Risk Insurance Act, as amended, c. 77, 40 Stat. 555, Sec. 13	2
World War Veterans' Act, 1924, Sec. 305, as amended (U. S. C., Title 38, Sec. 516)	3
Miscellaneous:	
Treasury Decision No. 20, promulgated March 9, 1918 (Regulations and Procedure, U. S. V. B., Volume 1, p. 9)	3

247277—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 167

A. H. THORNBURGH, ADMINISTRATOR OF THE ESTATE OF WINSTON ARTHUR CAMERON, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 294) is reported in 111 F. (2d) 278.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 2, 1940 (R. 300–301). The petition for a writ of certiorari was filed June 18, 1940. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in reversing a judgment in favor of petitioner, entered upon a jury verdict, on the ground that the verdict was not supported by any substantial evidence.[1]

STATUTE AND REGULATIONS INVOLVED

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or total permanent disability (c. 105, Sec. 400, 40 Stat. 398, 409).

The same Act, as amended, provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * * (c. 77, Sec. 13, 40 Stat. 555).

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[1] If certiorari should be granted, the Government would urge in support of the decision below that the District Court erred in refusing respondent's requested instruction with respect to the burden of proof (R. 283). The District Court's refusal to give this instruction was assigned as error in the court below (R. 291), and, contrary to petitioner's assertion (Pet. 3), the point was urged both by brief (Br. 13–14) and in oral argument before the court below. In view of the court's decision on the main issue, however, it was unnecessary to decide this question.

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * * [Regulations and Procedure, U. S. Veterans' Bureau, Volume 1, p. 9.]

STATEMENT

This suit was originally brought by Winston Arthur Cameron to recover permanent total disability benefits under a $10,000 contract of war risk term insurance issued to Cameron during his naval service from October 6, 1917, to April 9, 1918. No premium was actually paid on Cameron's policy after the month of May 1918, but by reason of compensation due him at that time and remaining uncollected until June 24, 1920, the policy remained in force until the latter date. See World War Veterans' Act, 1924, Section 305, as amended (U. S. C., Title 38, Sec. 516). At the original trial, issue was joined on Cameron's allegation that he became totally and permanently dis-

abled on or before May 11, 1920. The trial resulted in a verdict and judgment in favor of the plaintiff. On appeal to the court below, the judgment was reversed on the ground that the verdict was not supported by substantial evidence. *United States* v. *Cameron,* 87 F. (2d) 61, certiorari denied, 301 U. S. 688.[2]

Cameron died on January 21, 1939 and petitioner, having been appointed administrator of Cameron's estate, was substituted as plaintiff (R. 1–4). Petitioner thereupon filed an amended petition (R. 1–4), alleging, as before, that Cameron had become totally and permanently disabled on May 11, 1920 (R. 2). It was stipulated at the second trial, however, that there was sufficient uncollected compensation to keep the insurance in force until June 24, 1920 (R. 25), and the case was submitted to the jury on the issue of whether the disability had become permanent prior to that date (R. 268). The verdict and judgment were in favor of petitioner (R. 6–7) and respondent again appealed (R. 8), urging, as one of several grounds for reversal (R. 286–291), that the trial court erred in overruling its motion for a directed verdict at the close of the case for lack of substantial evidence that the in-

[2] The facts stated in this paragraph are taken from the record in this Court in the original suit, No. 828, October Term 1936. See Government's Brief in Opposition, p. 3.

sured became totally and permanently disabled during the period of insurance protection (R. 265, 286).

The Circuit Court of Appeals, observing that the "evidence adduced at both trials, except some of the medical evidence, was substantially the same" (R. 295), held, in accordance with its previous decision, that the record failed to furnish any substantial support for the finding that Cameron's total disability had become permanent within the period of insurance protection (R. 294–300).

ARGUMENT

The only issue in this case, on the merits, is whether Cameron's total disability became permanent on or before June 24, 1920. Decision of this issue depends, as petitioner admits (Pet. 17), upon the purely factual question of whether it was reasonably certain on or before that date that Cameron would continue to be totally disabled throughout life. The court below, after a careful examination of the record, came to the conclusion that there was no substantial evidence supporting the jury's verdict in favor of the petitioner on this point. The decision seems plainly correct for the reasons set forth at length in the court's opinion (R. 294–300). In any event, the decision obviously presents no occasion for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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